IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 20, 2006

STATE OF TENNESSEE v. GRANDON DAY

Direct Appeal from the Circuit Court for Williamson County
No. II-10522 R. E. Lee Davies, Judge

No. M2005-01120-CCA-R3-CD - Filed February 27, 2007

Grandon Day, the defendant, after convictions on fourteen counts of aggravated kidnapping (Class B felony) and five counts of aggravated assault (Class C felony), now appeals. Specifically, the defendant contends that two aggravated kidnapping convictions should have been merged into aggravated assault convictions. Secondly, the defendant asserts that the trial court's imposition of a fine totaling $82,500 was excessive and improper in any amount, due to the defendant's indigency. After careful review, we have concluded that the kidnappings in question were separate and distinct offenses to the aggravated assaults. We have further determined that the fines imposed were appropriate under the sentencing guidelines and were not excessive. Accordingly, the judgments of conviction are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

John H. Henderson, District Public Defender, for the appellant, Grandon Day.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Mary Katharine White, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves an armed invasion of a residence by the defendant and two accomplices. A party was in progress at the residence, and a large number of guests were present. The defendant was originally charged by presentment with fifteen counts of aggravated kidnapping, six counts of aggravated assault, one count of reckless endangerment, and one count of aggravated robbery. One count of aggravated kidnapping, aggravated assault, and aggravated robbery were each dismissed prior to trial. The defendant was found guilty on all other counts. However, the reckless endangerment conviction was merged with an aggravated assault conviction. The defendant was

sentenced to an effective term of eighty-four years as a Range I, standard offender and was fined $82,500.

Facts

Detective Adrian Breedlove of the Brentwood Police Department was notified to respond to a residence shortly after midnight on July 31, 2003, for what was termed a house invasion. Police sealed the area, and thirty or more witnesses were still on the scene. A party had been in progress, and the number of guests was estimated by witnesses to be as high as seventy-five or more. The Brentwood officers interviewed witnesses and examined both the residence and the grounds for evidence.

Officers found a spent .9 mm shell casing in the foyer, a spent .9 mm in the kitchen, and another in a mulch bed behind the residence. A .9 mm pistol, which belonged to a party guest, was found hidden in a crawl space in the residence. Pieces of black electrical tape were found in the yard and inside the house.

Some witnesses alleged that one of the invaders was a white male known as "Gold Mouth," and others stated this was Justin Scott. Detective Breedlove learned that Justin Scott was a street name for the defendant. A photo array including the defendant was presented to a witness, Will McGregor. After this, a warrant was issued for the defendant. While police were waiting for the defendant at his apartment, the defendant's mother left the defendant's apartment with a hamper of clothes and went to the laundry room. She gave permission for a search of the hamper's contents. Inside a pillow case, officers found a Lorcin .9 mm pistol, a camouflage facial mask typically used by hunters, a toboggan, and a work glove.

After the defendant's arrest, he volunteered a statement on December 30, 2003, to Detective Breedlove. He stated that he and a black male accomplice had watched the residence for three to four days prior to July 30, 2003. They believed that Ben Crossley, the son of the residential owner, had a large quantity of drugs which they intended to take. On the night of July 30, the defendant and two black males drove to an adjacent neighborhood, parked, and walked through a connecting field to the Crossley house. The three men were watching the house and saw a large number of guests present. A male guest made repeated trips to the side of the house to urinate. He eventually saw the defendant's group, and the group subdued him and restrained him with "duck tape." One of the defendant's accomplices took the guest's wallet and cell phone. While dragging the guest further from the house, the group was seen by a party guest.

The defendant stated he was armed with the AP .9 mm pistol and had lent a Lorcin .9 mm to one of the two accomplices. Afterwards, the defendant sold the AP pistol but had heard it was confiscated by police during an arrest in the Percy Priest area. The defendant said he was wearing a ski mask with a blue toboggan.

The defendant ran to the front door of the residence while his companions entered through the back. Some guests were trying to leave, and the defendant stopped them by pulling the pistol. The defendant said he fired it once at the floor when a guest refused a command to get on the floor. He heard other gun shots by his armed accomplice. The defendant described a scene of bedlam, with guests running from room to room and with some escaping outside. After several minutes, his group left by the back door, ran to the defendant's vehicle, and escaped. He said that he saw blue lights responding to the scene as they left.

Detective Breedlove stated that he located the AP-9 pistol (Tennessee Bureau of Investigation report refers to it as AA Arms AP-9) in the custody of Metro Nashville police and confirmed that it was seized in the Percy Priest area.

Michael Veron testified that he was the individual subdued and taped by three males. During this time, he saw one gun but claimed that he felt three guns at his back. He was able to free himself from the tape restraints but was seen while trying to escape and told to go back in the residence by one of the defendant's accomplices.

Will McGregor was deceased at the time of trial. His testimony from the preliminary hearing was read to the jury. He stated that a white male, wearing a bandana face covering and armed with a gun, entered the front door. The white male shot at the floor about two feet from McGregor. Two black males entered from the back door, and one of them was armed. McGregor said that the intruders were in the residence for fifteen to twenty minutes. He identified the defendant from a photo array. He stated that he was able to recognize the eyes and hair and said that he was ninety-five percent certain.

Matt Smitherman, another guest, testified that he saw a white male he knew as "Gold Mouth" drive by the residence early in the evening of July 30, in a blue Honda with two black males. He made an in-court identification of the defendant as "Gold Mouth."

A total of eighteen witnesses who were party guests testified at trial. There was some conflicting testimony as to the number of intruders and, in some cases, to their races. Their testimony was consistent as to gunshots being fired and to the general panic and fear of the guests. The witnesses' testimony was consistent that the intruders were pointing guns at the guests and attempting to confine their movements.

Special Agent Steve Scott of the Tennessee Bureau of Investigation, an expert in firearms identification, testified concerning evidentiary tests results. Three .9 mm pistols were tested. None of the submitted evidence matched the Intra Tech .9 mm pistol found hidden in the residence. Two .9 mm shell casings conclusively matched the AA Arms AP-9 weapon which the defendant, in his statement, claimed was in his possession. The .9 mm shell casing found in the mulch bed behind the house conclusively matched the Lorcin .9 mm pistol. A spent projectile found in the kitchen matched, though inconclusively, the AA Arms AP-9 weapon. The projectile was ruled out as fired from the Lorcin .9 mm.

In his testimony at trial, the defendant denied his presence or participation involving the charged offenses. He said that he had given the statement to Detective Breedlove in order to gain access to an unmonitored phone. He claimed that the purpose of the phone call was to have some associates ("my people") move cocaine from one of his apartments. The defendant admitted owning the Lorcin but said he had lent it to friends at the time of this incident. He stated that he had owned the AA Arms AP-9 pistol but had sold it on July 3, 2003.

Anthony Issue

The defendant, in his first issue, argues that his convictions for aggravated assault and aggravated kidnapping, as to Will McGregor and Paige Walters, should have been merged into aggravated assault due to due process considerations. The defendant relies on State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), and its progeny in contending that the two kidnapping convictions as to victims McGregor and Walters were essentially incidental to the convictions for aggravated assault of these victims. The State takes the position that restraint is unnecessary to accomplish aggravated assault and that any restraint, detention, or confinement used in committing aggravated assault may support a separate conviction for kidnapping. After review, we conclude that the facts of this case show that these convictions were based on two distinct acts, and we affirm the convictions.

State v. Anthony, supra, was a consolidated case involving two defendants with similar factual situations and the same issues. The defendants in these separate crimes were both convicted of aggravated kidnapping and armed robbery. Our Supreme Court held that a kidnapping conviction violated due process when predicated on movement or confinement that was merely incidental to an accompanying felony and not "significant enough, in and of itself, to warrant independent prosecution." Id. at 306. The Court in Anthony found that: (1) the removal or confinement did not substantially increase the risk of harm to the victims; (2) the movement of the victims was slight; (3) the confinement was brief; and (4) the victims were unharmed. Based on the findings, the kidnapping convictions were reversed due to being merely incidental to robbery. Id. at 307.

This issue was addressed again in State v. Dixon, 957 S.W.2d 532 (Tenn. 1997). Therein the Court stated:

> Anthony and its progeny . . . are not meant to provide the rapist a free kidnapping because he also committed rape. The Anthony decision should only prevent the injustice which would occur if a defendant could be convicted of kidnapping where the only restraint utilized was that necessary to complete the act of rape or robbery. Accordingly, any restraint in addition to that which is necessary to consummate rape or robbery may support a separate conviction for kidnapping.

Id. at 534-35.

One commits aggravated assault relevant to the instant cases who intentionally or knowingly causes another person to reasonably fear imminent bodily injury by the use or display of a deadly weapon. T.C.A. § 39-13-101(a)(2) - 39-13-102(a)(1)(B).

One commits aggravated kidnapping who knowingly removes or confines another "so as to interfere substantially with the other's liberty": (1) to facilitate the commission of any felony or flight thereafter; (2) with intent to inflict serious bodily injury on or to terrorize the victim or another; or (3) where the victim suffers serious bodily injury. T.C.A. § 39-13-305.

Paige Walters testified that she first thought the intrusion was a joke. She approached the defendant who pointed a gun at her and her date, Will McGregor. The defendant then fired a shot near McGregor's feet. The intruders told the group to go into the kitchen and pantry, where they were told to get on the floor. A gun was also pointed at them there. She estimated that they were held in that area for approximately fifteen minutes before the intruders left.

Will McGregor, in his prior testimony introduced at trial, stated that the defendant shot the floor approximately two feet from where McGregor stood.

It is apparent that the proof supplied the essential ingredients to support the defendant's convictions for both aggravated assault and aggravated kidnapping. However, we must determine if the additional movement or confinement: (1) prevented the victims from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victims' risk of harm. Anthony, 817 S.W.2d at 306. There was evidence that in the panic which ensued from the intrusion, some guests attempted, with varying degrees of success, to escape. The confinement of the victims in the kitchen and pantry was to frustrate escape and thereby lessen the defendant's risk of detection. We would further note that unlawful restraint is not necessarily incidental to aggravated assault although the true motivation of the defendant was ostensibly to rob the party host of drugs. The defendant was not convicted of robbery.

We further conclude that the restraint of the victims also substantially increased their risk of harm. There was evidence of shots fired in the house that ricocheted, and one such projectile was found in the kitchen. Whether a kidnapping is incidental to another offense is highly dependent on the facts of each case. Anthony, 817 S.W.2d at 306. Under these facts, we have determined that the kidnappings were separate and distinct from the aggravated assaults and that the convictions are not barred by due process considerations.

Assessment of Fines

The defendant, in his second and final issue, challenges the assessment of fines by the trial court. The defendant received an effective sentence of eighty-four years and was first assessed fines by the jury totaling $320,000 as to the convictions for aggravated assault and aggravated kidnapping. The trial judge subsequently modified those fines, resulting in a total of $82,500. The defendant contends that, as an indigent person, the defendant should not be assessed a fine in any amount. The State responds that the fines imposed by the trial court were proper.

Appellate courts in Tennessee have authority to review fines imposed by a trial court. State v. Bryant, 805 S.W.2d 762, 766 (Tenn. 1991). The defendant's ability to pay a fine imposed is one

factor to be considered along with other factors bearing on the determination of the entire sentence. Id.; see also State v. Patterson, 966 S.W.2d 435, 446 (Tenn. Crim. App. 1997). The ability of the defendant to pay the fine is not a controlling factor, and a substantial fine may be punitive in the same sense as incarceration. Id. The fine imposed by a trial court is to be based upon the principles of the 1989 Sentencing Act, including "prior history, potential for rehabilitation, financial means, and mitigating and enhancing factors, that are relevant to an appropriate, total sentence." State v. Blevins, 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997).

Before pronouncing sentence, the trial judge made certain specific findings by a preponderance of the evidence. The following excerpts guided the trial judge's determination of sentencing, including the imposition of fines:

> Okay. Now consider what we will do about discretionary consecutive sentencing in this case.
>
> All right. I turn to these factors which I'm required to find by a preponderance of the evidence. First, that the defendant has an extensive record of criminal activity. I find that he does.
>
> To support that finding I go back to the fact that he has admitted selling kilos of cocaine in the past. That he has done that for the past three years to make a living. That he keeps and stores drugs at his house, including that Monte Carlo that his boss was, I guess, owned where he was keeping the drugs in the Monte Carlo.
>
> That he would sell these drugs to other drug dealers in large quantities, specifically that he sold to Mr. Crosby (sic) basically every – on a weekly basis. That he was making three to six thousand dollars a week just on one client or customer.
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> That he admitted to setting up and putting into action the drive-by shooting of Justin Allender's Chevrolet Tahoe. That he was involved in some kind of activity in Murfreesboro that resulted in an order of protection being taken out against him by his ex-girlfriend.
>
> . . . .
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> That he admitted to having guns, many guns in many places. Of course, in fact, that he had guns in this particular instance that he used. That he attempted to intimidate the witnesses in this case from the jail by calling them and reading them their statements.
>
> All right. I'll also find under (1)(d) – and I'll just say what this is – that he is a dangerous offender whose behavior evidences little or no regard for human life and no hesitation about committing a crime where the risk to human life is high.
>
> Again, considering that factor I point out one more time that this was a home invasion in a – what I would call a safe neighborhood in Brentwood during a party where there was 75 to 100 teenagers attending.
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> And that he, first of all, attacked some poor soul – Mr. Vernon (sic), I think – who was outside. Threatened him with a gun, tied him up. And then had his two henchmen come in the back door with guns blazing.

He goes in the front door and fires off two rounds, one of them right between the feet of Mr. – is it McGregor? Yeah, McGregor. And right next to his girlfriend, Ms. Walters.

And because this was a planned thing – he staked this out the day before – there is no question that he had no hesitation in committing this crime.

He was there to either make some statement about who was going to control the drug trade in that particular area or to increase his stock of drugs by taking the drugs that Mr. Crossley had, or Crossley and company. There they were.

So, again, I point out – and, again, I point out that the second round he fired ended up in the kitchen where I think the testimony there was about 30 kids in the kitchen where that bullet ended up.

Now in addition to that I have to also find that an extended sentence is necessary to protect the public against further criminal activity by the defendant and that the consecutive sentences reasonably relate to the severity of the offenses committed. I find on both of those they do.

Again, I point out that if we can't be safe in our own homes, we really can't be safe anywhere. And this is a neighborhood where I would think there is little – I would say little or no crime – there's actually crime going on in that particular house. But violent crime, I would say. There's no violent crimes going on.

And so the public needs to be protected from Mr. Day because Mr. Day has not shown any remorse for what he's done. I find he's cold. I find you're calculating. Actually, I find there's not one redeeming factor about you. None.

. . . .

The fines on aggravated kidnapping based upon what I can reasonably conclude in this case probably need to be reduced. All aggravated kidnapping fines will be reduced to 5,000. All aggravated assaults will be reduced to 2500.

It is apparent from the trial judge's findings that he found the factors of sentencing extremely unfavorable for the defendant. Nevertheless, he reduced the jury's assessed fines by nearly seventy-five percent. Under these facts, we conclude that the fines imposed were not excessive.

Conclusion

In accordance with the foregoing authority and reasons, we conclude that the aggravated kidnappings were separate and distinct acts as opposed to necessarily incidental to the aggravated assaults. Furthermore, we have determined that the fines assessed were in accordance with the principles and guidelines of the Sentencing Act and, in light of the defendant's criminal career, were not excessive. Accordingly, the judgments of conviction are affirmed.

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JOHN EVERETT WILLIAMS, JUDGE